

# SENATE BILL REPORT

## SB 5292

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As Reported by Senate Committee On:  
Judiciary, February 11, 2009

**Title:** An act relating to persistent offenders.

**Brief Description:** Concerning persistent offenders.

**Sponsors:** Senators Kline, Hargrove, Pridemore, Kohl-Welles, Regala and McDermott.

**Brief History:**

**Committee Activity:** Judiciary: 2/04/09, 2/11/09 [DP, DNP].

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### SENATE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass.

Signed by Senators Kline, Chair; Regala, Vice Chair; Hargrove, Kohl-Welles and Tom.

**Minority Report:** Do not pass.

Signed by Senators Carrell and Roach.

**Staff:** Juliana Roe (786-7438)

**Background:** There are currently 292 offenders in prison pursuant to a "three strikes sentence:" a sentence of life in prison. One hundred and thirty-nine of these prisoners have been convicted of a most serious offense robbery in the second degree or an attempt thereof for at least one of their three strike offenses. Pursuant to RCW 9.94A.030:

(32) "Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies:

- (a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
- (b) Assault in the second degree;
- (c) Assault of a child in the second degree;
- (d) Child molestation in the second degree;
- (e) Controlled substance homicide;
- (f) Extortion in the first degree;
- (g) Incest when committed against a child under age fourteen;

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- (h) Indecent liberties;
- (i) Kidnapping in the second degree;
- (j) Leading organized crime;
- (k) Manslaughter in the first degree;
- (l) Manslaughter in the second degree;
- (m) Promoting prostitution in the first degree;
- (n) Rape in the third degree;
- (o) Robbery in the second degree;
- (p) Sexual exploitation;
- (q) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;
- (r) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;
- (s) Any other class B felony offense with a finding of sexual motivation;
- (t) Any other felony with a deadly weapon verdict under RCW 9.94A.602;
- (u) Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection;
- (v)(i) A prior conviction for indecent liberties under \*\*RCW 9A.88.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988;
- (ii) A prior conviction for indecent liberties under RCW 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988, if: (A) the crime was committed against a child under the age of fourteen; or (B) the relationship between the victim and perpetrator is included in the definition of indecent liberties under RCW 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27, 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25, 1993, through July 27, 1997;
- (w) Any out-of-state conviction for a felony offense with a finding of sexual motivation if the minimum sentence imposed was ten years or more; provided that the out-of-state felony offense must be comparable to a felony offense under Title 9 or 9A RCW and the out-of-state definition of sexual motivation must be comparable to the definition of sexual motivation contained in this section.

**Summary of Bill:** A conviction of robbery in the second degree or an attempt thereof is not considered a most serious offense and the offender is not considered a persistent offender. This law is retroactive. If the offender was sentenced prior to the effective date of this act, the offender must have a resentencing hearing if a current or past conviction for robbery in the second degree or an attempt thereof was used as a basis for the finding that the offender was a persistent offender.

The prosecutor, for the county in which the offender was sentenced as a persistent offender, will review the sentencing documents. The prosecutor must, and the offender is allowed to, make a motion for relief from sentencing to the sentencing court if the offender is eligible. The sentencing court must grant the motion and set an expedited date for resentencing if it

finds that the offender was sentenced as a persistent offender pursuant to being convicted of robbery in the second degree or an attempt thereof. The court must sentence the offender as if the offense was not a most serious offense at the time the original sentence was imposed.

The section relating to retroactivity expires July 1, 2011.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: Many three-strike offenders have been sentenced to life in prison after having been convicted of second degree robbery as one or more of their three-strike offenses. Second degree robbery is a low level offense that often does not involve physical harm. It is distressing to know that offenders can be sentenced to life in prison for such low-level crimes. Second degree robbery, under the three-strikes law, has the same penalty as first degree murder. Even prosecutors recognize this disparity and find ways to plea bargain around this law. It is significant to note that if second degree robbery were not considered a three-strike offense, offenders would be subject to a sentence of 15-20 months, and yet, under this law, offenders are subject to life in prison.

Low-level crimes, such as second degree robbery, increase in times of economic duress such as currently exist. This means that more people are likely to commit second degree robbery. This is not an effective crime reduction method nor is it fiscally sound. Three-strike cases are very expensive and many times are dealt with in the same manner as death penalty cases. These low-level offenders are going to grow old in prison. Prisons are having to build more geriatric units in order to accommodate the aging population. This, in turn, costs the government more money. This bill, if passed, would save money.

Many second degree robbery offenders have mental and substance abuse issues that would be better dealt with in a mental or substance abuse program than in prison.

There is a disparate effect on African Americans; approximately half of those in prison are African Americans. Many of those convicted under the three-strikes law have low-level second degree robbery as one or more of their three-strike offenses.

Although the Clemency and Pardons Board exists, the Governor has the final say as to whether an offender is granted clemency or pardon and this is something that is not done lightly. Even if the Governor grants one or two clemency or pardon cases, there are 139 people who may be eligible.

CON: Neither the expansion nor the restriction of the three-strikes law is favorable because prosecutors have learned how to use and defend this law. It is the prosecutor's job to weed out the lower level crimes.

The re-sentencing requirement is a serious concern. The *Blakely* decision prohibits judges from giving exceptional sentences. Re-sentencing would be difficult because prosecutors cannot always look back in time and see what issues were considered at the time of the original sentence or plea process. It is also difficult for the victims and their families. The King County Prosecutors Office has taken the initiative in the past couple of years to look back at three-strike cases involving second degree robbery and, in appropriate circumstances, sent those cases to the Clemency and Pardons Board. Clemency and pardons are available to these offenders. If clemency and pardons are not available, then there is a problem.

Second degree robbery is not always a non-violent offense. Victims are often injured by these crimes. This crime involves the most vulnerable in society and makes this a more serious crime. In fact, victims believe that prosecutors fail to take these cases seriously.

**Persons Testifying:** PRO: Senator Kline, prime sponsor; Earl Ford, Washington State Commission on African American Affairs; Larry Hoover, Virginia Faller, citizens; Noemie Maxwell, Justice Works; Tony Orange, Seattle/ Martin Luther King/ King County NAACP; Amy Bates, Black Policy Foundation; Ramona Brandes, Washington Association of Criminal Defense Lawyers and Washington Defenders Association; Beth Colgan, Columbia Legal Services.

CON: Tom McBride, Washington Associated of Prosecuting Attorneys; Dave Johnson, Washington Coalition of Crime Victim Advocates.